

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND CRAIG JONES,

Defendant-Appellant.

UNPUBLISHED

August 12, 2008

No. 276690

Wayne Circuit Court

LC No. 06-005379-01

Before: Markey, P.J., and White and Wilder, JJ.

Wilder, J. (concurring in part, and concurring in the judgment).

While I agree that defendant is entitled to a new trial, I would so conclude on a basis different from that of the majority. Accordingly, I write separately to explain my reasoning.

Defendant first argues that he was denied the effective assistance of counsel on three separate grounds. A criminal defendant has a constitutional right to counsel. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is afforded a strong presumption that counsel provided “reasonable professional assistance.” *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), mod on other grounds 468 Mich 233 (2003).

A court reviewing a claim of ineffective assistance of counsel also begins with a strong presumption that “the challenged action . . . might be considered sound trial strategy.” *People v LeBlanc*, 465 Mich. 575, 578; 640 NW2d 246 (2002). For example, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We afford matters of trial strategy this strong presumption even if the strategy was ultimately unsuccessful. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

To overcome these presumptions, a defendant claiming ineffective assistance must show that counsel’s assistance fell below an objective standard of reasonableness, and that this conduct was prejudicial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, the defendant must show that “but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different.” *Watkins, supra* at 30. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

People v Carbin, 463 Mich 590, 600; 623 NW2d 884 (2001). Stated differently, the defendant must demonstrate that “the attendant proceedings were fundamentally unfair or unreliable.” *Rodgers, supra* at 714.

As noted by the majority, defendant did not request a new trial or an evidentiary hearing, so our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). In my judgment, the fact that our review is limited to mistakes apparent on the record, is particularly damaging to defendant’s claim of ineffective assistance of counsel. As noted by the United States Supreme Court in *Strickland*:

The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.... In short, inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigative decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions. [*Strickland, supra* at 691.]

Defendant first argues that defense counsel improperly elicited evidence of defendant’s prior bad acts from two different witnesses. I disagree with the majority’s characterization of this evidence as “propensity” evidence. It appears from the record that defense counsel may have been surprised at the testimony by the victim’s mother, that she had heard that defendant had engaged in inappropriate sexual conduct with the victim in the past. Immediately following the cross-examination of the victim’s cited by the majority, defense counsel also elicited the following testimony:

Q. I see. All right. And yet you say you heard this, but this is the man that you say you still allowed to go around with your child?

A. Yes. Because when it was approached as a family thing, Raymond denied it and the family worked it out And if he said that he didn’t do it, okay. He was my cousin. He didn’t do it.

If, based on discussions with defendant, trial counsel expected that the victim’s mother had not heard of the “family thing” concerning the victim, it would not have been an inappropriate trial strategy for counsel to seek to establish through her testimony that defendant had a trustworthy reputation, and that because of this, she trusted defendant with her child. Since we have no evidence of counsel’s conversations with defendant, I would conclude that the strong presumption accorded counsel’s choice of trial strategy has not been overcome.

Once counsel was surprised by the victim’s mother’s testimony, counsel attempted to impeach her by questioning why she trusted defendant with her child, by eliciting testimony from the victim’s grandmother that the allegation had been recanted and was not believed by the family, and by establishing from the testimony of the officer-in-charge that, contrary to the victim’s mother’s testimony, she never did report her alleged knowledge of the victim’s allegation to him. This effort to impeach the victim’s mother did not, in my judgment, bring out evidence that was ultimately prejudicial to defendant. *Mack, supra* at 129.

Defendant next argues that defense counsel was ineffective for failing to object to the testimony of the officer-in-charge as inadmissible opinion testimony. He argues that the testimony was properly characterized as expert opinion testimony, and that the officer was not properly qualified as an expert. The officer testified that he was more likely to believe an adult's recollection of past dates, because, in his experience, children reporting sexual abuse in the past sometimes have had trouble with specific dates, and often refer to landmark events to mark time.

Under MRE 701, testimony of a lay witness may be admitted if it is “rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” *People v Yost*, 278 Mich App 341, 358-359; 749 NW2d 753 (2008). The officer’s testimony was rationally based on his own previous interviews with child sexual abuse victims, and aided the jury in understanding how he determined the date of the offense. He did not attempt to explain the underlying cause of the phenomenon. Cf. *People v Dobek*, 274 Mich App 58, 79 n 9; 732 NW2d 546 (2007) (witness who testified regarding “reasons that would explain” delayed disclosure by a child was an expert). Thus, the testimony was admissible under MRE 701, the officer did not need to be qualified as an expert under MRE 702, and trial counsel is not required to make futile objections or raise meritless arguments. *Mack, supra* at 130.

Defendant finally argues that defense counsel’s performance was deficient, when he had to be “coached” by the trial court while attempting to impeach the victim with prior recorded testimony. Defense counsel indicated to the court, after being admonished, that he was “hoping [the court] would give [him] a little latitude given [the victim’s] tender age.”¹ The court rejected this approach, and counsel accepted this. Defendant has not demonstrated that counsel was incapable of an orthodox impeachment strategy. In the absence of other evidence, we presume that defense counsel’s approach was sound trial strategy, even if it was unsuccessful. *Rodgers, supra* at 714.

Defendant also argues that the colloquy between the court and defense counsel caused the jury to discredit counsel’s performance *in toto*. Here again, defendant has not provided any evidence of this fact. Further, the trial court gave the usual instruction to the jury, that the lawyer’s questions and court’s “rulings, questions, and instructions are not evidence.” Jurors are presumed to follow instructions. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). We cannot conclude that the outcome would have been different absent this exchange.

Defendant next argues that the trial court abused its discretion when it granted an amendment to the information during trial. I would agree, under the unique circumstances of this case, and rely on the analysis articulated by the majority on this issue, in its entirety.

Finally, defendant also argues that the prosecutor committed misconduct by arguing from facts not in evidence in her closing argument. Defendant’s contention on this issue lacks merit, because there was testimony in support of the prosecutor’s arguments. *People v Gooding*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

¹ The victim was eight years old at the time of trial.

In summary, I agree with the majority that the matter should be reversed and remanded for a new trial, but for differing reasons, as outlined above.

/s/ Kurtis T. Wilder